Wheeling Brake Block Manufacturing Company and Wheeling Brake Band & Friction Manufacturing Company *and* Retail, Wholesale, and Department Store Union, Local No. 379, and The United Food and Commercial Workers Union.[1]
Cases 8–CA–34764 and 8–CA–35543

May 23, 2008

DECISION AND SUPPLEMENTAL ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On December 9, 2005, Administrative Law Judge David I. Goldman issued the attached bench decision. On November 21, 2006, the National Labor Relations Board issued an Order Remanding Proceeding to the judge for receipt of evidence "bearing on the issue of the proper identity of the Respondent" and for the issuance of a supplemental decision and recommended supplemental Order. On March 14, 2007, the judge reopened the record pursuant to the November 21, 2006 Order. On May 31, 2007, the judge issued the attached supplemental decision. Thereafter, Respondent Wheeling Brake Band & Friction Manufacturing Company filed exceptions to the judge's supplemental decision, and a supporting brief. The General Counsel filed an answering brief, and Respondent Wheeling Brake Band & Friction Manufacturing Company filed a reply brief.[2]

The National Labor Relations Board[3] has considered the bench decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified[4] and to adopt the recommended supplemental Order as modified.[5]

[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers from the AFL–CIO effective July 29, 2005.

[2] Respondent Wheeling Brake Block Manufacturing Company did not file exceptions to the judge's supplemental decision.

[3] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[4] Because the General Counsel did not issue and serve an amended complaint on Wheeling Brake Band & Friction Manufacturing Company, out of an abundance of caution we do not at this time pass on whether it is liable as a single employer with Wheeling Brake Block Manufacturing Company for the unfair labor practices found in this case. Accordingly, we shall delete references to Wheeling Brake Band & Friction Manufacturing Company in the Conclusions of Law, Order, and notice. The General Counsel may, however, plead and litigate the question of Wheeling Brake Band & Friction Manufacturing Company's derivative liability during the compliance stage of this proceeding. See, e.g., *George C. Shearer Exhibitors*, 246 NLRB 416 fn. 3 (1979), enfd. mem. 636 F.2d 1210 (3d Cir. 1980)

[5] In light of the disaffiliation of the United Food and Commercial Workers from the AFL–CIO, we shall modify the judge's notice to delete the reference to the AFL–CIO. We shall also modify the recommended Order and notice to include an expunction remedy, and shall correct an inadvertent omission in the notice.

AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 1.

"1. Respondent Wheeling Brake Block Manufacturing Company is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act."

ORDER

The National Labor Relations Board adopts the recommended supplemental Order of the administrative law judge as modified below and orders that the Respondent, Wheeling Brake Block Manufacturing Company, Bridgeport, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph. 2(c) and reletter the subsequent paragraphs.

"(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs of Robert Maxwell, Timothy Colley, Ronald McKenzie, John Cumberlidge, Greg Brawdy, and Richard Palmer, and within 3 days thereafter notify them in writing that this has been done and that the layoffs will not be used against them in any way."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT layoff, fail to recall, or otherwise discriminate against you for supporting the Retail, Wholesale, and Department Store Union, Local 379 and the

United Food and Commercial Workers Union, or any other union.

WE WILL NOT tell employees that we are going to get rid of the Union and replace it with a union that we control.

WE WILL NOT solicit employees to assist us in getting rid of the Union so that other employees will more readily accept the loss of the Union.

WE WILL NOT implicitly or explicitly promise any employee that by opposing the Union the employee will be recalled from layoff.

WE WILL NOT maintain and enforce an overly broad prohibition on union activity on our premises.

WE WILL NOT repudiate the collective-bargaining agreement, including the seniority, pension contribution, and dues checkoff provisions of the collective-bargaining agreement.

WE WILL NOT refuse to recognize and bargain a successor collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Greg Brawdy and Richard Palmer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Maxwell, Timothy Colley, Ronald McKenzie, John Cumberlidge, Greg Brawdy, and Richard Palmer whole, with interest, for any loss of earnings and other benefits resulting from their layoff.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Robert Maxwell, Timothy Colley, Ronald McKenzie, John Cumberlidge, Greg Brawdy, and Richard Palmer, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the layoffs will not be used against them in any way.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All production and maintenance employees employed by us at our Bridgeport, Ohio facility, excluding all office clerical employees and all professional employees, guards, and supervisors as defined by the Act.

WE WILL make all affected employees whole, with interest, for any loss of earnings or benefits resulting from the repudiation of the expired collective-bargaining agreement, including the repudiation of the seniority and pension provisions of the collective-bargaining agreement.

WE WILL reimburse the Union, with interest, for dues we were required to withhold and transmit under the collective-bargaining agreement.

WE WILL make all contributions to the Union-Industry pension plan that we were required to make under the collective-bargaining agreement, including any additional amounts due the plan on account of our failure to make these contributions at the time they were owed.

WE WILL reimburse unit employees, with interest, for any expenses they have incurred because of our failure to make required contributions to the Union-Industry pension plan.

WE WILL rescind the rule in the expired collective-bargaining agreement prohibiting union activity on our premises and WE WILL advise you that this has been done and that you are free to engage in union activity at our facility during nonworking time and in nonworking areas, and in any other areas and other times on such terms as other nonwork-related activity is permitted, without retribution.

WHEELING BRAKE BLOCK MANUFACTURING COMPANY

Thomas M. Randazzo, Esq. for the General Counsel.
Henry A. Arnett, Esq. for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

DAVID I. GOLDMAN, Administrative Law Judge. This case was tried in St. Clairsville, Ohio, on November 16, 2005. The charge in Case No. 8–CA–34764 was filed on January 7, 2004, and amended on February 27 and May 24, 2004, by the Retail, Wholesale, and Department Store Union, Local 379, and the United Food and Commercial Workers, AFL–CIO (hereinafter Union or Charging Party). An additional charge was filed in Case 8–CA–35543 on January 6, 2005, by the Union. The consolidated complaint issued March 31, 2005. The Respondent, Wheeling Brake Block Manufacturing, Co., filed a timely answer on April 8, 2005.

Respondent did not appear at the hearing despite having received repeated notification of the time and place of the hearing (GC Exh. 3).[1] After hearing the testimony of the General Coun-

[1] This includes notification I provided to Respondent's general manager, Robert Burgess. After Respondent failed to make a representative available for an October 28, 2005 pretrial telephone conference I had attempted to schedule, I faxed and mailed to Burgess the letter I have placed in the record as ALJ Exh. 1 (along with the fax receipt confirmation notices). The letter reiterated that the hearing in this case was scheduled for November 16, 2005, informed Burgess that the conference call was rescheduled for November 4, and provided contact information for my office. Neither Burgess nor any representative of the Respondent contacted my office and when my assistant placed the

sel's witnesses and considering the documentary evidence and oral argument of Counsel for the General Counsel and Counsel for the Charging Party, I recessed the hearing until November 18, 2005, at which time I rendered a bench decision in accordance with Section 102.35(a)(10) of the Board's Rules and Regulations.

I hereby certify the accuracy of the November 18, 2005 transcript, pages 1 through 35, as corrected, containing my bench decision. A copy of that portion of the transcript is attached as Appendix A. Corrections to the transcript are reflected in the attached Appendix C [omitted from publication].

In supplement to the attached bench decision, I add the following. The General Counsel alleged, and I have found, that two conversations that Plant Manager and Owner Robert Burgess had with Local Union Official Palmer, on July 15 and 18, 2003, were coercive and violative of Section 8(a)(1). As recited in the bench decision, on July 15, when Palmer came to the plant to get his layoff notice, Burgess initiated a conversation with Palmer in which he solicited Palmer "to get rid of the Union," emphasizing, as Palmer credibly testified, that if "I would get rid of the Union, the rest of the people would follow in my steps. They wouldn't argue about it." (Tr. 31, 32.)[2] As demonstrated by Burgess' remarks 3 days later, the July 15 comment was part of an effort to induce Palmer to assist Respondent's plan to get rid of the Union. On July 18, Palmer returned to the plant to meet with Burgess regarding the failure of the Respondent to recall employees back to work in order of seniority. Burgess again raised the subject of getting rid of the Union. Burgess said "that he was going to get rid of the Union in order to keep the ones he wanted" (Tr. 38–39), and added that "we could have a Union, but the Union there would be all answering to him, Rob Burgess. He would make final decisions and everything." (Tr. 32–33.) Given that both the July 15 and 18 remarks were made to Palmer in the context of the unprecedented layoff, I found in the bench decision that "[i]mplicit in these conversations [was] that by ingratiating himself with Burgess by helping to get rid of the union, Palmer's recall prospects would be better" (Appendix A at 11). In fact, this link was also made explicit. Palmer testified that in the July 18 discussion Burgess "made the reference that he need a mixing man, and if I wanted to get rid of the Union that he would take me back as a mixing man." (Tr. 38.) Thus, I find that Burgess explicitly promised to recall Palmer if he would oppose the Union, action that Burgess believed, and told Palmer, would encourage other employees to accept the Respondent's effort to "get rid of the Union." Palmer did not accept Burgess' recall offer, and the next time they met Burgess was adamant that Palmer would not be recalled. (Tr. 42–43.) As noted in the bench decision, Palmer and Brawdy, the only local union officials at the facility, each of whom was solicited by Burgess to get rid of the Union and each of whom refused to comply, were the only employees never recalled. The explicit promise of recall to Palmer in exchange for acceding to Burgess' demand that he assist in "get[ting] rid of the Union" further supports the findings in the bench decision that Burgess' comments to Palmer violated Section 8(a)(1) and that the failure to recall Brawdy and Palmer violated Section 8(a)(3).

The General Counsel alleged, and I found that the July 14, 2003 layoff was unlawfully motivated and violated Section 8(a)(3) and (1). As noted in the bench decision, any employee suffering a loss of work as a result of this layoff is a discriminatee. However, as also discussed in the bench decision, the evidence does not show that all employees were laid off. Moreover, the complaint identifies only six specific individuals alleged to be among those laid off. Two of them, Brawdy and Palmer, testified at the hearing. Based on their testimony, and the documentary evidence, there is no doubt that they were laid off and never recalled by the Employer. The other four—Robert Maxwell, Timothy Colley, Ronald McKenzie, and John Cumberlidge—did not testify. Significantly, the Respondent's answer to the complaint admits that each of the four were laid off. Moreover, as detailed in the bench decision, records provided by the Respondent to the Region during the investigation of this case and introduced into evidence as General Counsel's Exhibit 30, provide further support for the complaint allegation that these four employees were laid off. In response to requests for records showing hours worked since June 2003, the Respondent submitted responses evidencing a diminution of hours worked for Maxwell and Cumberlidge for the week of July 14, 2003. The response shows no hours worked for Colley the weeks of July 14, and July 21, 2003, and thereafter documents a return to full-time hours. The Respondent's submission does not show McKenzie working at all until January 19, 2004. In addition, in GC Exh. 30, the Respondent admits that there were layoff slips similar to those provided to Brawdy and Palmer (GC Exhs. 9, 10) for employees Maxwell, Cumberlidge, and Colley, although the Respondent states that it is unable to locate the slips. Further, both Palmer and Brawdy testified—albeit without much specificity—that they thought that with one or two exceptions (the exceptions they identified were employees Mellinger and, perhaps, Dymidowski) all the union member employees had been laid off for at least a short time. Although the evidence is not entirely clear as to the duration of their layoff, all the evidence supports the conclusion that Maxwell, Colley, McKenzie, and Cumberlidge lost work as part of the July 14, 2003 layoff.[3] If others were also laid off, the evidence is lacking, and, in any event, the complaint does not identify any other alleged discriminatees.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

conference call on November 4, Burgess' office informed her that Burgess was unavailable to take the call.

[2] W]here an employer solicits employees to campaign against union representation . . . the Board has consistently held that such solicitation violates Section 8(a)(1) without reference to whether the solicited employee's union sentiments are known to the employer." *Allegheny Ludlum, Inc.*, 333 NLRB 734, 741 (2001) (and cases cited therein at n. 55) enfd. *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167 (2002). This is essentially what Burgess was asking of Palmer on July 15.

[3] The extent of lost wages and benefits suffered by the discriminatees is a matter that can be determined in a compliance proceeding.

3. The Union, at all material times has been the exclusive collective-bargaining representative, based on Section 9(a) of the Act, of an appropriate unit for such purposes as defined by Section 9(b) of the Act of Respondent's employees at its Bridgeport, Ohio facility, composed of:

> all production and maintenance employees employed by the Respondent at its Bridgeport, Ohio facility, excluding all office clerical employees and all professional employees, guards, and supervisors as defined by the Act.

4. The Union and the Respondent were parties to a collective-bargaining agreement governing the unit employee's terms and conditions of employment that was effective by its terms from October 1, 2001 through September 30, 2004.

5. By informing an employee that the Respondent was going to get rid of the Union and replace it with a union controlled by the Respondent, by soliciting an employee to assist Respondent in getting rid of the Union, so that others would more readily accept the loss of the Union, by implicitly and explicitly promising the employee that for opposing the Union the employee would be recalled from layoff, and by maintaining and enforcing an overly broad prohibition on union activity on its premises, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

6. By laying off of employees Robert Maxwell, Timothy Colley, Ronald McKenzie, John Cumberlidge, Richard Palmer, and Greg Brawdy, on July 14, 2003, and by failing to recall employees Greg Brawdy and Richard Palmer thereafter, Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of employees, to discourage membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act.

7. By laying off and recalling employees without regard to the seniority provisions of the parties' collective-bargaining agreement as of July 14, 2003, by withdrawing from the union-industry pension fund as of July 10, 2003 and thereafter failing and refusing to make contractually-mandated pension contributions to the fund, by failing and refusing to deduct and transmit dues deductions pursuant to the parties' collective-bargaining agreement from July 11, 2003 to September 30, 2004, by repudiating the parties' collective-bargaining agreement as of July 11, 2003, and by failing and refusing the Union's request to recognize and bargain with the Union for the purpose of negotiating a successor collective-bargaining agreement, the Respondent has failed and refused to bargain collectively with the representative of its employees and is in violation of Section 8(a)(1), (5), and (d) of the Act.

8. The unfair labor practices set out in paragraphs 5, 6, and 7, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully laid off employees Robert Maxwell, Timothy Colley, Ronald McKenzie, and John Cumberlidge, on July 14, 2003, must make each employee laid off whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of layoff to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition to making them whole in accordance with the preceding, as to the two employees Respondent has, to date, failed to reinstate, Greg Brawdy and Richard Palmer, it must immediately offer each of them reinstatement to the position they occupied prior to the layoff, or to an equivalent position, should their prior position not exist, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Respondent shall rescind the unlawful rule prohibiting union activity on its premises, advise employees it has done so, and that they may engage in union activity on the premises of Respondent during nonworking time and in nonworking areas, and in other areas and other times on such terms as other nonwork related activity is permitted, without retribution.

Having found that the Respondent violated Section 8(a)(1) and (5) by failing and refusing to make contractually required payments into the union-industry pension plan, from July 11, 2003, the Respondent shall make the unit employees whole, with interest, for any loss of benefits they may have suffered as a result, in the manner prescribed by *Ogle Protection Service,* 183 NLRB 682 (1970)*,* enfd. 444 F.2d 502 (6th Cir. 1971). The Respondent shall be required to make all contractually required benefit payments or contributions that were not made from July 11, 2003, including any additional amounts applicable to such delinquent payments, in accordance with *Merryweather Optical Co.,* 240 NLRB 1213, 1216 (1979). In addition, the Respondent shall reimburse unit employees, with interest, for any contributions they themselves may have made for the maintenance of the contractual pension funds after Respondent unlawfully discontinued contributions to those funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Respondent shall reimburse the Union, with interest, for lost dues that should have been paid contractually but were not paid to the Union because of the employer's repudiation of the labor agreement including the dues check off provision, for the term of the agreement, which ran until September 30, 2004, in the manner set forth in *Ogle Protection Service,* supra*.* All interest due and owing shall be computed as prescribed in *New Horizons for the Retarded,* supra.

Respondent shall, upon demand of the union, meet and confer with the union for the purpose of bargaining a successor collective-bargaining agreement .

Respondent shall post an appropriate informational notice, as described in Appendix A, attached. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to the Employer, it shall sign it or otherwise notify the Region what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Wheeling Brake Block Manufacturing Company, Bridgeport, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that the Respondent is going to get rid of the Union and replace it with a union controlled by the Respondent, soliciting employees to assist Respondent in getting rid of the Union so that other employees would more readily accept the loss of the Union, implicitly and explicitly promising employees that by opposing the Union the employee would be recalled from layoff.

(b) Maintaining and enforcing an overly broad prohibition on union activity on its premises.

(c) Laying off and failing to recall employees to rid itself of the Union and union supporters.

(d) Failing and refusing to abide by and repudiating the collective-bargaining agreement, including the seniority, pension contribution, and dues-checkoff provisions of the collective-bargaining agreement.

(e) Upon request, failing and refusing to recognize and bargain a successor collective-bargaining agreement with the union.

(f) In like and related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to employees Greg Brawdy and Richard Palmer to their former jobs or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make employees Robert Maxwell, Timothy Colley, Ronald McKenzie, John Cumberlidge, Greg Brawdy, and Richard Palmer, whole with interest, in the manner set forth in the remedy section of this decision and order for any loss of earnings or other benefits resulting from the layoff described in this decision and order.

(c) Make all affected employees whole, with interest, in the manner set forth in the remedy section of this decision and Order, for any loss of earnings or benefits resulting from the repudiation of the collective-bargaining agreement, including the repudiation of the seniority, pension, and dues- checkoff provisions of the collective-bargaining agreement.

(d) Reimburse the Union, with interest, for dues it was required to withhold and transmit under the collective-bargaining agreement, in a manner described in the remedy section of this Decision and Order, resulting from the Respondent's repudiation of the dues-checkoff provision of the collective-bargaining agreement.

(e) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit described in the decision and order concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in signed agreements.

(f) Rescind the rule prohibiting union activity on the premises of the Employer and advise employees that it has done so, and that they are free to engage in union activity on the respondent's facility during nonworking time and in nonworking areas, and in any other areas and other times on such terms as other nonwork related activity is permitted, without retribution.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. *Bryant & Stratton Business Institute,* 327 NLRB 1135 (1999).

(h) Within 14 days after service by the Region, post at its facility in Bridgeport, Ohio, copies of the attached notice marked "Appendix A"[5] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX A

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BENCH DECISION

NOVEMBER 18, 10:00 A.M.

JUDGE GOLDMAN: Good morning. We're back on the record. I'm going to issue a bench decision at this time.

Here telephonically are Mr. Arnett for the Charging Party Union and Mr. Randazzo as counsel for the Acting General Counsel.

Respondent was contacted this morning but was not available to participate or be present on this call and so they are not present.

I've heard the testimony in this case and have taken oral argument and considered the evidence and so I'm now ready to render a bench decision pursuant to 102.35,

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

102.35(a), parens, (10) of the Board's Rules and Regulations.

The charge in 8–CA–34764 was filed on January 7, 2004 and amended February 27th and May 124th, 2004 by the Retail, Wholesale and Department Store Union Local 379 of the United Food and Commercial Workers Union.

The complaint issued on May 25, 2004 and amended complaint notice of hearing issued June 8, 2004 against the Respondent, Wheeling Brake Block 25 Manufacturing.

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An additional charge was filed in case on January 6, 2005 by the Union and a consolidated complaint issued March 31, 2005. Respondent, Wheeling Brake Block filed a timely answer on April 8, 2005.

The complaint alleges that Paragraph 8 what are two independent 8(a)(1) violations, these are statements by the Respondent, specifically by its General Manager Robert Burgess that intended to rid itself of the collective bargaining representative.

Paragraph 9 of the complaint alleges a different kind of 8(a)(1) violation that Respondent maintained and enforced an overly broad prohibition on union activity. A clause—and that's contained in the collective bargaining agreement, the clause that maintains, that, that carries out that rule.

Paragraph 10 alleges that discriminatory lay off and recall of employees, that is allegedly an 8(a)(3) violation but also in contradiction of the party's collective bargaining agreement and in that way is also alleged to be a violation of 8(a)(5).

Paragraph 11(a) of the complaint alleges unilateral discontinuation of dues deduction from July 11, 2003 to February 6, 2004, which at trial counsel for General Counsel moved to amend to continue that

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violation, to continue to allege that's a violation not just through February 6, 2004 but to September 30, 2004, which is the date of the expiration of the collective bargaining agreement.

Paragraph 11(b) alleges the unilateral withdraw from the contractual pension plan. It's alleged in the complaint that these are violations of 8(a)(5) and further alleged they collectively, the actions taken by Respondent amount to repudiation of the party's collective bargaining agreement on or about July 11, 2003.

And finally the complaint alleges that Respondent failed and refused union request to meet and bargain for successor bargaining agreement, which is alleged in an 8(a)(5) violation.

Counsel for the General Counsel and the Charging Party who tried this case are already cited in the record and I'm not going to restate appearances here. As noted Respondent—as noted in the record

Respondent did not appear for the hearing. I now turn to the Board's jurisdiction over this case. The Employer and Respondent Wheeling Brake Block Manufacturing admits in its answer and I find that it's a West Virginia corporation with an office and facility in Bridgeport, Ohio, and that it's

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engaged in the manufacture of industrial brake parts.

It has also admitted in its answer in the course of its business it sells and ships goods value in excess of $50,000 directly to points located outside of the State of Ohio and I find that Respondent has been and is an employer engaged in commerce within the meaning of Sections 2.2, 2.6 and 2.7 of the Act.

I further find that the Charging Party Union has been and is a labor organization within Section 2.5 of the Act as is evidenced by the testimony at the hearing and the numerous documents entered into evidence including the now expired collective bargaining agreement.

The answer of Respondent admits and I find that—hold that thought—okay strike that. The answer of Respondent admits and I find that Robert Burgess at all material times was and is a supervisor within the meaning of Section 2.11 of the Act and a agent of Respondent within the meaning of Section 2.13 of the Act.

Turning to the facts of this case. The evidence introduced at the hearing shows the Charging Party has been the representative bargaining unit of Respondent's employees for many years since before

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1987 according to the testimony. There have been a succession of labor agreements covering the terms and conditions of the bargaining unit employees since that time, most recent was effective October 1st, 2001 through September 30, 2004 and it's found in the record as General Counsel's Exhibit 6.

The General Counsel put on three witnesses, employees Richard Palmer and Greg Brawdy who are active in and held posts with the Local Union at the facility. In addition John Moore, an International Union Representative who serviced the Local Union, testified for the General Counsel.

Based on my observation of their demeanor while testifying and in context with the documentary evidence and the record as a whole I find that all three testified credibly.

There were occasional difficulties remembering certain events such as dates or when or if a letter was received, which led to small discrepancies in testimony, not so much between witnesses but in the testimony of a given witness but I do not think this distracts from their credibility. I think it shows their testimony was unscripted and reflected an honest effort to recount events.

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The evidence revealed the following: The Employer announced a temporary shut down of the plant the afternoon of Friday, July 11, 2003. This occurred an hour or two before the scheduled three o'clock finish of the workday.

The lay off was to be effective Monday, July 14th, although General Manager Burgess actually emerged from

his office the afternoon of July 11th quote "ranting and raving" end quote and yelling that he was shutting the plant down and was not going to run it anymore.

He said he was going to return the business to his father. At least some employees left Friday afternoon before the regularly scheduled end of the work shift at three o'clock.

Two weeks before the lay off Burgess approached Brawdy, who was the chairman of the local union at this facility, and told him that quote "we should get rid of the union" end quote.

He solicited Brawdy's assistance in this plan however Brawdy told Burgess that he wanted to have a union and refused to assist Burgess.

This conversation is not alleged by the General Counsel as a violation of the Act presumably because it's outside of the 10(b) period, as the

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initial charge was filed slightly more than six months after this incident.

For that reason I do not find it to be a violation, however it is pertinent background that sheds light on subsequent events and is indicative of the mind set and motivations of this Respondent.

Richard Palmer who, in addition to Brawdy was the only other local union official at the facility, was on vacation July 10th, 2003. He was called by Respondent's management on July 10th and told not to come into work on Monday, July 14th as scheduled because of the lay off that would begin that day.

I note to the fact that Palmer was contacted on the 10th meant that Burgess' outburst on the afternoon of the 11th was more for show than an actual outburst of frustration over circumstances that led him to suddenly to shut down the operation the afternoon of July 11th.

Other evidence discussed below indicates that on July 10th the Company withdrew from the multi employer pension fund. This also supports the view that the alleged mass lay off was planned in advance for July 14th.

I believe the lay off was part of a plan,

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the interest in which Burgess expressed to Brawdy in late June or early July of getting rid of the union.

Having failed to enlist Brawdy after the lay off began Burgess reached out to the other local union official, Richard Palmer. Palmer was told by Burgess to come to the plant on July 15th to pick up his lay off slip. At that time Burgess approached Palmer and asked Palmer to help quote "get rid of the union".

He stated to Palmer that if Palmer would support getting rid of the union the other employees would follow his lead.

On July 18th when Palmer was at the plant again to discuss the lay offs with Burgess, Burgess once more raised the subject of the union when they were alone in the office, in Burgess' office.

At that time Burgess announced that he 1wanted to get rid of the union. He stated that employees could have a union but the union would have to answer to Burgess, meaning he would make the final decisions for the union.

I find that each of these conversations with Palmer are violations of Section 8(a)(1). In each instance the subject of getting rid of the union was pointedly raised by the highest-ranking management

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official.

In each instance the context of the conversation about getting rid of the union was the unprecedented lay off at the plant.

On July 15th the conversation occurred when Palmer was ordered by Burgess to come to the work site to pick up his lay off slip. The July 18th conversation occurred in Burgess' office when Palmer came to the plant to discuss the lay offs.

Implicit in these conversations is that by ingratiating himself with Burgess by helping to get rid of the union, Palmer's recall prospects would be better.

In addition the conversations announced an interest in intent on Burgess' part, already in motion for the lay offs, so the plan to go non-union or to at least replace the union with some form of Company dominated union. The message to Palmer was to join up and implicitly I believe to suffer the consequences if he did not.

Of course as discussed below both Palmer and Brawdy paid the price for their failure to accede to Burgess' demands that they assist his efforts to get rid of the union.

I note that threats to go non-union by

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management are unlawful and for that proposition cases such as Shuck Components Systems 230 NLRB 838 at 842 from 1977, Associated Constructors 325 NLRB 998 at Page 1007 from 1998 and American Automatic Sprinkler Systems 323 NLRB 920 at Pages 920 and 921 from 1997.

The comments to Palmer about getting rid of the union were not friendly discussions and clearly would have a reasonable tendency to interfere, restraining course of employees in the exercise of Section 7 rights.

Turning to the lay offs. It's not insignificant in considering the lay offs that both local union officials at the facility were solicited to support getting rid of the union. Both refused and they are the only employees never to be recalled notwithstanding their significant seniority.

I think clearly the lay offs can only be understood in the context of Burgess' stated desire to rid the plant of the union.

It's also notable that the lay off was carried out in a discriminatory fashion. At the time of lay off there were 11 employees performing bargaining unit work, two of whom were not in the union. An additional bargaining unit employee was out on sick leave.

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Of the 12 bargaining unit employees only two were union officials Brawdy and Palmer. They were never recalled to work despite their being number three and four, respectively, on the seniority list.

They were the only employees never recalled and, in fact, most employees were back to work within a week and some did not miss any work.

Based on testimony and records supplied by the Employer during the Region's investigation into the charges in this case the following information about the lay off can be reconstructed.

Taking a look at the employees in order of seniority, James Maxwell was the senior employee. He worked 16 hours the week of July 14th, suggesting that he was laid off for three days but in any event showing that he returned to work the week of the 14th.

Second employee on the seniority list is Richard Mellinger. Mellinger worked 40 hours the week of July 14th. He does not appear to have been laid off.

Employer Roger Dunn was fifth on the seniority list after Brawdy and Palmer. He worked 40 hours the week of July 14th. He does not appear to have been laid off.

Employee William Davenport was on sick

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leave at the time of lay off and returned directly from sick leave to full-time employment, without being laid off, the week of September 8, 2003.

Employee Timothy Calli suffered a two-week lay off and was recalled to full-time employment the week of July 28th. Employee Richard—Ronald McKenzie. The record showed he worked full-time as of January 19th, 2004. Based on the available records he appears to have been laid off for a significant time, approximately six months.

Employee Victor Dymidawski is next on the seniority list. He worked a full week of, full—he worked a full 40 hours the week of July 14th and did not suffer a lay off.

Next is employee Cumberlidge who worked eight hours the week of July 14th and then resumed full-time work the following week suggesting a four day lay off.

In addition, testimony revealed that two newer employees hired prior to the lay off and performing bargaining unit work but who were not members of the union were not laid off on July 14th.

One of these employees is known, was described only as Dave who performed bargaining work in shipping and there was an employee, Roger Phillips,

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who operated a sander and also worked in shipping. Neither of these two were union members and the testimony showed that they were not laid off.

In sum what this shows is that of the 12 employees performing bargaining unit work only two were never recalled. They, not so coincidentally I believe, were the two union officials Brawdy and Palmer and both had refused the Employers entreaties to turn on the union.

After those two the general lay off becomes a much smaller event. One employee was laid off for six months, another for two weeks, other than that everyone was working the week of the, everyone who was working the week of—strike that.

Other than that everyone who was working on the week of July 7th was back to work the week of July 14th and five of the 12 worked 40 hours the week of July 14th and effectively suffered no lay off.

Under these circumstances I find that the general lay off was discriminatory and a violation of Section 8(a)(3). I believe that the announcement of the shut down of operations on Friday afternoon was a sham designed to allow the employer to pick and choose which employees would be back to work Monday and which would be laid off.

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I should note that arguably the lay offs began Friday afternoon. It did for Brawdy who went home an hour or two early that afternoon pursuant to Burgess' direction.

So arguably even employees who resumed work on Monday morning and lost no time from work the week of the 14th were subject to discrimination on the 11th as the entire shut down was part of an unlawfully scheme but I think that with the exception of Brawdy the evidence is too sketchy about who was laid off Friday afternoon.

I conclude, as Palmer was informed that the lay offs began in substance on Monday with those employees that the employer decided to lay off.

And as I said the announcement on Friday, July 11th about a temporary shut down was just cover for the selective and discriminatory lay off of the following week.

I find that the general lay off was motivated by Burgess' stated desire to get rid of the union and that Brawdy and Palmer were singled out for what has been to date a permanent lay off because of their union activity and their unwillingness to renounce that union activity.

I think that the right line burden has been

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met by the General Counsel. That well-known test requires that the General Counsel make out a prima facie case that the anti union animus contributed to the adverse employment actions. The General Counsel does so.

It's up to the Respondent to persuade that it would have taken the same action in the absence of protected conduct.

The employer cannot carry this burden merely by showing that it also has a legitimate reason for its action but it must persuade that the action would have taken place absent protected conduct.

The evidence here of animus is direct and unequivocally and a lay offs impact clearly fell largely on the only two employees who were union officials and who refused to go along with getting rid of the union.

And the lay off occurred just two weeks after Burgess approached Brawdy with his plan to get rid of the union. That timing is highly suspect.

That Palmer was not approached about getting rid of the union till after the lay offs doesn't change anything. That would be the time when he was most vulnerable.

And I think, in fact, it's revealing that

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in the midst of a lay off, that was allegedly generated by business considerations, that Burgess made a point of talking to Palmer about getting rid of the union twice.

Also the fact that the recalls and lay offs were done without regard to seniority, which is an express requirement of the collective bargaining agreement, is also suggestive of the discriminatory motivation as was the fact that there was no history of lay offs at the plant according to testimony of Union Representative Moore.

I would note here that it is a violation of Section 8(a)(3) of the Act for an employer to order a general lay off for the purposes of discouraging union activity or in retaliation against employees because of the union activities of some.

In this case the general lay off allegedly resulting from a temporary closure was a pre-text to rid the union of certain employees, primarily to rid the facility of the two union officers, but the entire lay off is therefore tainted and unlawful and any employee swept up in the lay off is a discriminatee.

Respondent, of course, chose not to attend the hearing and therefore did not put on any evidence to rebut the General Counsel's case. What evidence

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there is is suspicious.

The lay off slips for Brawdy and Palmer say that the reason for the lay off is that the company is temporarily closed due to management change of ownership. Those are found in General Counsel's Exhibits 9 and 10.

This is essentially what Burgess stated in his tirade the afternoon of July 11th but it's obviously false as the vast majority of employees were back working the next week and many suffered no loss of work that week. The Company did not close.

Finally, additional evidence is found, per the proposition of the lay offs, were discriminatory and the conduct of the Employer after July 14th, I'll discuss this shortly.

I would note here that in making my findings regarding the recall and lay offs I've relied upon credited testimony but also records of hours worked found in General Counsel's Exhibit 30, which is a document provided by Respondent to the Region as part of its investigation of the charge.

Similar information was demanded from Respondent by subpoena, which was placed in the record as General Counsel's Exhibit 5 and returnable the day of the hearing in accordance with NLRB practice.

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The General Counsel represented that no documents were provided in response to the subpoenas and no petition to revoke or quash was ever submitted.

Given Respondent's total non compliance with the subpoenas I think the introduction of materials provided to the Region during the investigation of the charges filed in this case is particularly appropriate.

But also note that Board law recognizes that position letters and materials submitted by Respondent to a Region may be used as admissions against interest introduced in such as a Board proceeding, in a Board proceeding.

And for that, one would look to the Federal Rule of Evidence, Rule 801(d)(2) in cases such as Schneider's Inc. 241 NLRB 850 from 1979 and Steve Alloyed Ford 179 NLRB 229 Footnote 2 from 1969 and a host of other cases.

The General Counsel has also alleged the 2 lay offs were not only violations of Section 8(a)(3) but violative of Section 8(a)(5) as they ignored the collective bargaining agreement.

Article 4 Section 2 of the collective bargaining agreement states, "Seniority shall govern the lay off and re-employment of employees provided

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that the employee is capable of doing the work".

Clearly seniority was flouted with regard to the lay off and recall. There's no evidence that 0the seniority employees were incapable of doing the work. That was asserted by Respondent as to Palmer.

Palmer disputes it and I note that Palmer and other senior employees worked at the facility by definition of their being senior for some years without any evidence of a problem handling the work.

As seniority is a mandatory term and condition of employment I find that the employer's repudiation of it was violative of Section 8(a)(5), (1) and 8(d) and a case supporting that is Hilton's Environmental 320 NLRB 437.

The evidence also shows that at the time of the lay off and the timing is not in my view coincidental the employer withdrew from the union's district pension fund and ceased making contributions to the fund on behalf of employees.

Article 10 of the collective bargaining agreement required that these payments be made at specified rates through September 30, 2004 at a set amount per employee.

There's no question based on the testimony of Union Representative Moore and the exhibits entered

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into evidence, specifically General Counsel's Exhibit 18 and 21, that the Respondent ceased making pension contributions on or about July 11th, 2003.

Indeed the response of the grievance filed by the union over this issue, General Counsel's Exhibit 21, suggests that any allegations quote, "in regard to union dues or pension payments were the result of instructions from the respective employees" end quote.

To the extent this is an admission or rationale for ceasing pension contributions it is not valid. Pensions are a mandatory subject of bargaining and even with employee

consent, for which there's no evidence, the employer is not privileged to cease making contractually mandated pension contributions.

Moreover I find it noteworthy the General Counsel's Exhibit 18, which is a letter from the pension fund to Burgess, begins with the gray line of quote "withdraw liability" end quote and the letter, the body of the letter, begins by stating quote "This 2will acknowledge notification indicating that as of July 10th, 2003 your company has withdrawn from participation in the above multi employer pension fund" end quote.

This shows that Burgess wrote or contacted

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the fund on July 10th, 2003 before the lay offs and withdrew from the fund. While that letter from the employer or notification from the employer to the fund is not in evidence, the funds' acknowledgement letter appears to be a standard fund letter written to employers in the ordinary course of business who give notice of withdrawal.

For that reason it carries the heighten reliability from what otherwise might be considered hearsay evidence. Given that it suggests strongly that the decision to withdraw from the pension fund was made as of July 10th, it is highly suggestive of the fact that the lay off that followed were part of a scheme that was planned by the company to rid the company of its union obligations.

It adds evidentiary weight to my findings that the lay offs were part and parcel of anti union offensive plan by the employer.

Clearly the company did not bargain with the union about ceasing the pension payments or offer the union an opportunity to bargain before ceasing the pension payments.

It's well settled that the employer violates Section 8(a)(5) when during the term of a labor contract fails to make appropriate and

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contractually required fringe benefit payments.

See for example D.C. Mason Buildings Inc. 321 NLRB 1081 from 1996 and Stevens and Associate Construction Company 307 NLRB 1403 from 1992 and Lear Ziegler 283 NLRB 929 from 1987. The company's conduct was a violation of Section 8(a)(5), 8(d) and 8(1)—8(a)(1).

The testimony and evidence also shows that the employer ceased transmitting dues to the union in July. Prior to that the employer had deducted dues from employee pay pursuant to check off cards and transmitted dues to the union pursuant to the agreement to do so found in the collective bargaining agreement.

The evidence and the testimony of Union Representative Moore and particularly General Counsel's Exhibit 15 showed these payments stopped in July and never started again. July dues were quote "short" unquote by $7.56 and no dues were transmitted thereafter.

The collective bargaining agreement provides, and employees are paid weekly on Fridays, if the weekly shift extends to a Friday and that monthly dues are deducted on the second pay of each calendar month.

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That would mean that dues were deducted for July from the July 11th paychecks. Thus it would appear that the company did as alleged cease making dues deductions as of July 11th, 2003.

If the company did not bargain this change with the union or provide the union with an opportunity to bargain over it, this is straightforward violation of 8(a)(5), (1) and 8(d).

There is a question as to the duration of this violation. The complaint originally alleged the failure to remit dues violation continued only until February 6, 2004.

Apparently the complaint was pled that way not because the employer began deducting and remitting dues again on February 6, 2004 but because of General Counsel's Exhibit 17, which is a fax sent to union representative Moore on February 6, 2004 from Burgess that included what the fax cover sheet refers to as quote "your copy of revocation from employees" end quote.

The fax includes eight documents entitled quote "Acknowledgment of revocation of authorization" end quote, each of which is dated February 6, 2004 and is identical except for each appears to be signed by each remaining union employee at the facility.

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The revocation states that the employees are acknowledging that they revoke the authorization to deduct dues beginning July 2003 and that they are currently reaffirming that revocation.

These revocations were received on the heels of a union grievance, General Counsel's Exhibit 21, filed February 2, 2004 filed in part over the Company's owing of dues for periods going back to July of 2003.

At the hearing Union Representative Moore testified that after he received these purported revocations he received a call from one employee, whose revocation form was sent in, who told him that the employer told employees that if the employees didn't sign the revocation they wouldn't have a job.

At that point counsel for the General Counsel moved to amend the complaint to alleged failure to deduct dues from on or about July 11, 2003 until September 30, 2004, the date of the contract's expiration.

I believe Moore was credible in his testimony and that he was called by an employee who told him essentially that the employees were coerced into signing the revocations however the statement is, of course, rank hearsay.

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And while Respondent chose not to be present in the hearing and therefore did not object to the introduction of this hearsay evidence I still have trouble accepting it as evidence for truth of the matter asserted.

The hearsay nature of the evidence limits its weight in my view. Having said that however and for much the same reasons the revocation cards or actually the copies that were faxed to the union are also hearsay evidence.

They were sent to the union with the assertion that they represent the employees' decision to revoke dues deduction authorization but there is no foundation testimony regarding how they were procured, where the form language came from or even evidence that any employee actually signed a card.

All we have in evidence is something received by the union. The cards were obviously not 1offered into evidence and were not accepted for the truth of the matter asserted in them.

I note that the cards are, on their face, somewhat suspect. They assert a seven-month retroactive revocation. Also note that although it's hearsay and as I say I cannot rely on it for the truth of the matter asserted, the only foundation evidence

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in the record as to how the cards came about is the hearsay statement to Moore to the effect that the cards were the product of coercion.

Given the state of the evidence I cannot find that there was valid evidence of revocation that would limit the employer's obligation to deduct and remit dues to February 6, 2004.

I grant the General Counsel's motion to amend the complaint, find that the employer's violation in failing to deduct dues, deduct and remit dues continued through the expiration of the labor agreement on September 30, 2004.

I also find that the conduct of the employer constitutes a whole scale repudiation of the 1 collective bargaining agreement as of July 11, 2003.

To review, we have a repudiation of the seniority clause in the labor agreement, of the dues check off clause and of the pension provision set in the context of anti union animus and discrimination against local union officials in an effort of Respondent to rid itself of the union.

These are serious 8(a)(5) violations that strike at the heart of the protection's offered by the contract, in particular the loss of seniority and pension contributions cannot be considered fringe or

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minor or technical repudiations by the employer.

Similarly the Board has found that an employer's failure and refusal to make payments for severance pay, vacation pay and health insurance premiums constitutes a repudiation of a contract and that's Victory Specialty Packaging Inc. 331 NLRB Number 139 from the year 2000 and then the famous case of Oak Cliff and Gold Baking Company 207 NLRB 1063 from 1972 where the Board said that an across the board wage reduction constitutes a general repudiation of the collective bargaining agreement.

Here I believe that the elimination of pension contribution and especially the elimination of seniority is of that severe in nature and renders the contract repudiated.

I turn now to the evidence found in Union Representative Moore's testimony and in General Counsel's Exhibits 22, 23, 25 and 26, that the employer failed and refused to recognize and bargain with the union for a successor labor agreement to replacement of the agreement set to expire September 30, 2004.

The union repeatedly requested bargaining for a successor contract. The first request was made July 7, 2004 and the employer ignored that and

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subsequent requests at one point claiming flood damage and saying the employer would get back to the union, which it did not do

Even after September 30, 2004 the union's request for dates and times to meet was met with silence. There's no excuse offered for this failure to meet and bargain.

It's a straightforward per se refusal to bargain under Section 8(a)(5) of the Act and it's also a violation of 8(a)(1) and many cases support that proposition. For instance B & B Gallo Pest Control Services 265 NLRB 535 from 1982, Associated Constructors 325 NLRB 998 at 1009 from 1998, Automatic 1Sprinkler Corp. 319 NLRB 401 at Page 402 from 1995.

Finally, the General Counsel alleges that Respondent maintained and enforced an overly broad prohibition on union activity. That restriction is found in the collective bargaining agreement at Article 1, Section 6.

It states in relevant part quote "Union property except as provided in this agreement—I'm sorry, strike that. Quote—it states in relevant part quote "Union activity except as provided in this agreement shall not be engaged in on company time or property" end quote.

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This is a facially unlawful clause. It is of no relevance that the union agreed to it in the collective bargaining agreement. It is far more restrictive of employer's rights than what is permitted under the Act.

It targets all and only union activity. It prohibits it on all company property, not just working areas, and it prohibits it on company time, not just while working.

It is therefore patently unlawful and I find its maintenance enforcement is a violation of Section 8(a)(1) of the Act and cases that support that include Jenson Enterprises 339 NLRB 877 at 878, stands for the proposition that employer may not restrict union related conversation while permitting conversation relating to other topics.

Also important is cases that support the proposition that the words company time' may be reasonably construed to mean that any discussion of union or union related matters at any time, including during breaks and other non working periods, is prohibited and that's unlawful.

And so clauses would—the words prohibiting union activity on company time are presumptively unlawful and there's, of course, been no

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rebutting of that presumption in this case. Those cases include M.J. Mechanical Services Inc. 324 NLRB 812 at 813 from 1997 and RCN Corporation 333 NLRB 295 from 2001.

So that's my decision. I enter an order consistent with it. I wont restate my conclusions of law here now. I've described them. I will restate them when I issue the follow up written decision that will come up with the full recommended order remedy and notice.

The remedy for these violations of the Act that I found will be for Respondent to cease and assist there from and take affirmative action designed to effectuate the purpose of the Act.

Such affirmative action shall include making each employee laid off on July 14, 2003 as part 1 of the employer's unlawful lay off whole for loss wages and benefits, offering reinstatement to employees Brawdy and Palmer to their former positions.

Such affirmative action will also include rescinding the rule against union activity on company time found in Article 1 of the expired collective bargaining agreement and informing employees that the rule has been rescinded.

The affirmative action will include

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reimbursing the union for loss dues that should have been paid contractually but were not paid because of the employer's repudiation of the dues check off provision during the term of the agreement.

The affirmative action will include remitting all pension payments due under the collective bargaining agreement on behalf of unit employees from the time the employer unilaterally withdrew from the pension fund and failed to make pension contributions.

The affirmative action shall include upon the demand of the union meeting and conferring for the purpose of bargaining a successor collective bargaining agreement.

The affirmative action shall also require that Respondent rescind its repudiation of the now expired contract and notify the union in writing that it will honor the terms of that contract through the period until the contract expired.

And the remedy will also include an order that informational notice, that I will describe in more detail in my follow up written decision, will be posted.

Effectively it will say that the employer will not take these kinds of acts or anything like

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them that will interfere, restrain or coerce employees in the exercise of their Section 7 rights and that the employer will make the employees and the union whole as I've described in the remedy, and I will describe in more detail in my written decision.

This notice will be posted in the employer's facility or wherever notices are regularly posted for 60 days without anything covering it up or defacing its contents.

And when the notice is issued to the employer he shall sign it or otherwise notify the Region what action he will take with respect to the decision.

So that's my decision on the facts and the evidence. When I receive the transcript in a couple of weeks I will certify the accuracy of the decision and formalize the conclusions of law, order remedy and notice and then the case will be transferred to the Board and at that time all parties will receive a copy of the decision.

Does anyone have anything they need to put on the record?

MR. RANDAZZO: Your Honor, this is Randazzo. I just wanted to make sure that your order is going to cover, and I might have just missed this,

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but Paragraph 8, the two threats that were alleged as 8(a)(1)?

JUDGE GOLDMAN: Yes.

MR. RANDAZZO: Okay.

JUDGE GOLDMAN: Yeah I found the two threats to Palmer were 8(a)(1), if I left them out of the remedy section it will, although I think that that will not be an affirmative action, it will just be a cease and assist.

MR. RANDAZZO: That, that's correct, sir. I just wanted to make sure. I could have missed it but you may have touched on it but I just wanted to make sure.

JUDGE GOLDMAN: Yes.

MR. RANDAZZO: Okay, thank you, sir.

JUDGE GOLDMAN: Yes, they'll be included. Okay. If that's all then with that I'll close the hearing.

MR. ARNETT: Thank you very much, Your Honor.

JUDGE GOLDMAN: Okay.

MR. RANDAZZO: Thank you, Your Honor.

JUDGE GOLDMAN: Okay. Thank you. (Whereupon the teleconference was concluded at10:41 a.m. on Friday, November 18, 2005)

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

DAVID I. GOLDMAN, Administrative Law Judge. This case was the subject of a bench decision, Certification, and recommended Order issued December 9, 2005. Therein I found that the Respondent, Wheeling Brake Block Manufacturing Company (Wheeling Brake Block),[1] engaged in numerous unfair labor practices and I recommended commensurate remedies. The matter was transferred to the National Labor Relations Board (the Board) and in the absence of exceptions the Board adopted the bench decision and recommended Order on February 1, 2006. However, on April 4, 2006, expressing concern that its orders had not been properly served on the Respondent, the Board caused its Order adopting the Bench Decision and

[1] I have amended the caption in this matter to reflect the motion to amend the complaint offered by the Government and granted by me at the March 16, 2007 hearing.

recommended Order to be vacated and set May 2, 2006, for receipt of exceptions. By letter dated May 1, 2006, the Board received correspondence, treated by the Board as a motion to reopen the record, from Attorney Michael Morelly who purported to represent Wheeling Brake Block and Bernard Lee Burgess (Lee Burgess) the president of Wheeling Brake Block. Attorney Morelly asserted that Wheeling Brake Block was not a proper party in interest in this matter. In his letter, Attorney Morelly asserted that Wheeling Brake Block "has been an[ ] idle company since 1998" and that "[t]he corporation who is the real party in interest in this cause is Wheeling Brake Band & Friction Mfg., Inc," a company owned and operated by Robert Burgess, the son of Lee Burgess. According to Morelly, Robert Burgess had "usurped the identify of Wheeling Brake Block by carrying on the business of manufacturing industrial brake parts under both names as the situation suited his needs best." Attorney Morelly's correspondence characterized the answer to the complaint previously filed by Attorney Gerald P. Duff on behalf of Wheeling Brake Block as part of a "fraud that has been perpetrated upon the National Labor Relations Board."[2]

On November 21, 2006, the Board issued an order remanding this matter to me to reopen the record and resume the hearing for the purpose of taking evidence pertaining to the issue of the proper identity of the Respondent. The Board's remand order instructed that upon the close of the hearing I should issue a supplemental decision and recommended Order.

The hearing was reconvened before me in Steubenville, Ohio, on March 14, 2007. In addition to the counsel for the General Counsel, Rick Marshall, entered an appearance for the Charging Party Union. Attorney Morelly entered an appearance as counsel for Lee Burgess.[3] At the hearing, the Government moved to amend the complaint to add Wheeling Brake Band & Friction Manufacturing, Inc. (Wheeling Brake Band & Friction) as a respondent, contending that Wheeling Brake Band & Friction was an alter ego of Wheeling Brake Block and/or that the two enterprises constituted a single employer and/or joint employers. Alternatively, the General Counsel contended in his motion that Wheeling Brake Band & Friction was a successor to Wheeling Brake Block. I granted this motion, which was unopposed at the hearing.[4]

After submission of evidence the hearing was recessed on the afternoon of March 14, 2007, and the record held open until March 28, 2007, while the parties reviewed certain documents and evidence. On May 16, 2007, counsel for the General Counsel filed his brief in support of his position. Attorney Morelly did not file a brief. In addition, although it had not appeared at the hearing and had ignored multiple subpoenas directed to it, Wheeling Brake Band & Friction submitted a brief filed by none other than former counsel for Wheeling Brake Block, Gerald P. Duff. On the entire record, including my observation of the demeanor of the witnesses and other indicia of credibility, and after considering the briefs filed by the parties, I make the following supplemental findings of fact, conclusions of law, and recommendations.

Summary

Lee Burgess owns an array of industrial brake operations around the country, including Wheeling Brake Block, which was incorporated in the 1960s and has operated from the site currently known as 56100 Berkley Avenue since approximately 1968.[5] His family members are intimately involved in the op-

[2] In that answer Wheeling Brake Block admitted its identity, its operation of the industrial brake facility at 56100 Berkley Avenue, in Bridgeport, Ohio, its sale and shipping of goods in excess of $50,000 directly to points outside of Ohio, and its collective-bargaining relationship with the Charging Party Union. The answer also admitted that Robert Burgess was Wheeling Brake Block's general manager and vice president and an agent and supervisor of the Respondent within the meaning of the Act. See also GC Exh. 28 at p. 3.

[3] Although no appearance for Wheeling Brake Block was entered, Lee Burgess is the founder and president of Wheeling Brake Block. His essential claim in this litigation is that Wheeling Brake Block ceased operations long before the unfair labor practices found in these cases and should not be liable for any misconduct occurring at the 56100 Berkley Avenue facility in 2003. The record demonstrates, and I find, that Lee Burgess was an agent of Wheeling Brake Block within the meaning of Sec. 2(13) of the Act during all periods material to this decision. Yet the record also demonstrates that at the time of the hearing Lee Burgess had little or no influence over (or even access to) the operations at 56100 Berkley that, notwithstanding his legal contentions, continue in the name of Wheeling Brake Block. I do not believe he can be held responsible for the failure of Robert Burgess, Wheeling Brake Block and Wheeling Brake Band & Friction to comply with the subpoenas directed to them in this litigation.

[4] The motion to amend offered by the General Counsel was consistent with the notification of intention to amend the complaint submitted by the General Counsel to the parties, including Wheeling Brake Band & Friction, by letter dated March 6, 2007. (GC Exh. 1(tt.)) In particular, the letter was sent to the attention of Robert Burgess, once in his capacity as manager of Wheeling Brake Block and a second time in his capacity as manager of Wheeling Brake Band & Friction. The letter was sent to Burgess in this fashion at the Bridgeport, Ohio facility at which the unfair labor practices at issue occurred, *and* at the Glendale ,West Virginia facility that he also manages. Thus, Burgess was sent four copies of this letter, two to each of the facilities he indisputably operates under the names Wheeling Brake Block and Wheeling Brake Band & Friction. Notwithstanding this, Wheeling Brake Band & Friction did not appear at the hearing. It did, however, file a posthearing brief. In it, Wheeling Brake Band & Friction acknowledges the General Counsel's March 6, 2007 letter and notice of intent to amend the complaint. Wheeling Brake Band & Friction does not contend that it was unaware of the hearing, or of the General Counsel's intention to amend the complaint at the hearing. It offers no excuse for its failure to attend the hearing (or for its failure to comply with the numerous subpoenas directed to its personnel). Rather, its brief is devoted to arguing that the General Counsel's motion to amend should be denied because the allegations against Wheeling Brake Band & Friction lack merit.

[5] Wheeling Brake Block operates a second facility in Glendale, West Virginia. The employees of that facility have never been represented by the Union and the bargaining unit covered by this case is limited to the Bridgeport, Ohio facility. An additional, union-represented Wheeling Brake Block facility in Wheeling, West Virginia closed by 1993. Union Representative Randy Belliel testified that when he serviced Wheeling Brake Block in the mid-1990s he retained references to the Wheeling facility in the collective-bargaining agreement to ensure that there would be no challenge to the Union's representational status should the facility restart operations. All of the labor agreements through the last one, effective through 2004, continue to reference and surport to cover both the Bridgeport and Wheeling facilities but by all

eration of some of these facilities. One of his sons, Robert Burgess, has managed Wheeling Brake Block since late 1993 and holds the title of general manager and vice president of Wheeling Brake Block. The record reveals that Robert Burgess managed the Company with some oversight from and in consultation with his father who lived elsewhere and traveled the country visiting his various holdings. Eventually, the father and son's relationship deteriorated to the point that in 2005 the father's attorney was receiving letters from the son's attorney stating that Lee Burgess should not come on the property or contact employees of the facility. In 2005, the landowner of 56100 Berkley Avenue (a firm controlled by the father) filed suit to evict Wheeling Brake Band & Friction in the Court of Common Pleas for Belmont County, Ohio. That litigation was pending at the time of the supplemental hearing in this matter.

Although the failure of Robert Burgess to honor the subpoenas directing him to appear at trial leaves unclear the full scope of the machinations involved in these interrelated businesses, the record does permit some fairly straightforward conclusions as to the matters most relevant to the instant litigation. In short, Lee Burgess' contention that Wheeling Brake Block should not be liable for the Board's order is without force. No evidence supports any of the key contentions in Attorney Morelly's original submission to the Board. There is no evidence that Robert Burgess "usurped" the identity of Wheeling Brake Block, "pos[ed] as an agent of Wheeling Brake Block," used its name without permission, or executed labor agreements with the Union "without the authority" of Wheeling Brake Block. Wheeling Brake Block was and is a proper respondent. There is no evidence whatsoever that the answer filed on its behalf was fraudulent. Indeed, record evidence corroborates the admissions in the answer, particularly the continued (and authorized) operation of Wheeling Brake Block by Robert Burgess. At the same time, Lee Burgess' intervention in these proceedings alerted the General Counsel to the possibility of extending the complaint to seek to impose joint and several liability on Wheeling Brake Band & Friction, a company owned by the son (and perhaps his wife), and which, as discussed herein, the record demonstrates to be a single employer with Wheeling Brake Block. The General Counsel's motion to amend the complaint falls squarely within the ambit of the Board's remand Order as it concerns the issue of the proper identity of the Respondent. As discussed herein, the General Counsel's effort to hold Wheeling Brake Band & Friction liable as a respondent is fully warranted.

evidence the Wheeling facility has remained inoperative since before 1993.

FINDINGS OF FACT

The record demonstrates and I find the following:[6] As referenced supra, Wheeling Brake Block has operated from, among other locations, the site currently known as 56100 Berkley Avenue in Bridgeport, Ohio, since approximately 1968. In the latter part of 1993, Robert Burgess, who had been working at another family business in New Orleans, was assigned by his father to take over the operation of Wheeling Brake Block.[7] In June 1994, after Robert Burgess assumed management of the operation, a second company, Wheeling Brake Band & Friction was created by Lee Burgess. (See GC Exh. 56.) According to Robert Burgess, ownership of Wheeling Brake Band & Friction was assigned to Robert Burgess and his wife as a means to protect Wheeling Brake Block from IRS tax liens placed on the property. Wheeling Brake Band & Friction's role was to sell the industrial brake products produced by Wheeling Brake Block. According to Robert Burgess, there was a surreptitious purpose to the arrangement: "You got to be careful. Wheeling Brake block sold the stuff to Brake Band and Brake Band was the sales company and it sold it out other door . . . so that Brake Block would not have an income." According to Robert Burgess the point of this was "to deceive and avoid the internal revenue service . . . that was our operation." Burgess made clear that by "we" and "our" he meant "[m]e and my father." According to Burgess, "[w]e owed them $300,000 we didn't

[6] My findings rely in significant part on the October 31, 2006 deposition testimony of Robert Burgess provided in the Ohio State court suit brought by Lee Burgess' real estate holding company against Wheeling Brake Band & Friction. At the hearing, when Robert Burgess failed to appear pursuant to subpoena the General Counsel moved to introduce the deposition transcript. There was no objection, rather, Lee Burgess' counsel "stipulated" to admission of the deposition transcript. I accepted the transcript into evidence under Fed.R. Evid. 801(d)(2). I note that I also admit this evidence as a response to Robert Burgess, Wheeling Brake Brand & Friction, and Wheeling Brake Block's failure to comply with or file a petition to revoke the numerous subpoenas served upon them by the General Counsel. *Bannon Mills, Inc.*, 146 NLRB 61, fn. 4, 633–634 (1964) ("If the best evidence which could have been offered on this issue is not before us, responsibility therefore rests with Respondent who refused to honor a subpoena by the General Counsel for its production.").

[7] Although I generally credit employee Greg Brawdy's testimony, I believe he was mistaken when he testified that Rob Burgess began managing Wheeling Brake Block just 5 to 6 years before the July 2003 discriminatory layoff (discussed in the original bench decision). The weight of the testimony and record evidence suggests that it was prior to that, and that Brawdy's recollection was simply a best estimation offered many years after the fact without benefit of any documents or other references. *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950) ("nothing is more common in all kinds of judicial decisions than to believe some and not all, of a witness' testimony"), vacated on other grounds, 340 U.S. 474 (1951). Randy Belliel, the International union representative who serviced Wheeling Brake Block from approximately 1993 to 1997 testified that Burgess was present, and had only recently arrived at the facility when he began servicing the facility in the latter part of 1993. Belliel seemed sure of the year he arrived, and he would have known if Burgess were there when he arrived. I credit his testimony on this point over Brawdy's, and over Rob Burgess' statements in his deposition testimony that he was assigned by his father to manage the Bridgeport facility in March 1994.

want to pay, so we made it look like . . . [Wheeling Brake Block was] not showing any profit. They're selling the stuff to Brake Band for a dollar a pound or some crazy [price]."[8] According to Burgess, Wheeling Brake Band & Friction's profit, earned from selling the product of Wheeling Brake Block, was then siphoned off into payments made for the benefit of Lee Burgess and his companies. These payments continued until 2003.

Wheeling Brake Band & Friction operated from 56100 Berkley Avenue in Bridgeport as did Wheeling Brake Block. In 1994 it paid the property taxes and arrears for a number of Lee Burgess' companies, including the Berkley Avenue facility. In June 1995, working with an accountant, Robert Burgess began denoting these tax payments as "rent," or more precisely, payments in lieu of rent, in order to allow Wheeling Brake Band & Friction to take tax deductions. Robert Burgess referred to this arrangement as a means of "defrauding the tax return" and his testimony suggests that the payments were not actually in lieu of rent.[9]

Over the years, Burgess also used Wheeling Brake Band & Friction profit to pay for machinery and improvements to machinery used to produce product. Part of the motivation for this was the hope that Wheeling Brake Band & Friction's interest in the machinery would prevent the Internal Revenue Service from confiscating machinery in order to satisfy judgments.

According to Robert Burgess, he and his father "changed over" the payroll of Wheeling Brake Block to Wheeling Brake Band & Friction in 1999. At some point, after 1996 and by 1999, the evidence suggests that the paychecks received by employees began to indicate that the payor was Wheeling Brake Band & Friction instead of Wheeling Brake Block. By 2000, unemployment compensation records indicate that the employer was named Wheeling Brake Band & Friction. According to Palmer, at some point, Wheeling Brake Band & Friction "just showed up" on the employees' paychecks.

From the employees' and Union's perspective, this change to Wheeling Brake Band & Friction's payroll was a nonevent. Employee Greg Brawdy testified that one day, approximately a year before the unlawful July 2003 layoff (described in the original decision in this matter), Rob Burgess told Brawdy that he was changing the name of the facility to Wheeling Brake Band & Friction. The employees continued performing the same work—making brake shoes—at the same location—the tin building located at 56100 Berkley Avenue. There was no division between Wheeling Brake Band & Friction employees and Wheeling Brake Block employees: there was one work force performing the same work as always. Management did not change. The sign outside the facility continued to say "Wheeling Brake Block." There was no notice of a shutdown or termination of Wheeling Brake Block provided to employees. As Brawdy put it, "[n]othing changed." According to former employee and local union representative, Richard Palmer, he was not aware of any difference between Wheeling Brake Block and Wheeling Brake Band & Friction. No notice of a closure or shutdown of Wheeling Brake was ever provided to the Union. To this day, Wheeling Brake Band & Friction has never operated separately from Wheeling Brake Block. As Brawdy explained, products continued to be shipped out under the name "Wheeling Brake Block" as well as under the name "Wheeling Brake Band & Friction." There was no apparent difference or basis of distinction between when products were shipped using the Wheeling Brake Block name and the Wheeling Brake Band & Friction name. Both names were used, but the products shipped under the names were identical. The former corporate secretary of Wheeling Brake Block, D. Davis-Sparbanie (who resigned from Wheeling Brake Block in 1993), testified that she now works at a company in Mars, Pennsylvania, that occasionally purchases industrial linings from the Bridgeport facility. Davis-Sparbanie testified that the products are shipped in boxes that say Wheeling Brake Block Manufacturing Company on the box and the packing slip will also say Wheeling Brake Block. However, her understanding is that these Wheeling Brake Block products are "invoiced" to Wheeling Brake Band & Friction for payment. To this day, Wheeling Brake Block as well as Wheeling Brake Band & Friction continues to buy supplies (see GC Exh. 30 at responses to item 4(c)) which show bills to Wheeling Brake Band & Friction and bills to Wheeling Brake Block. Wheeling Brake Block maintains an extensive website (GC Exh. 59), where it lists Wheeling Brake Block and Wheeling Brake Band & Friction at the same phone number, address, website, and does not distinguish between the companies. The website attributes to Wheeling Brake Block all the products that the record suggests are made at the facility, including friction materials and bands. As the website notes, "Wheeling Brake Block is still a family owned and operated manufacturer." Robert Burgess continues to participate on the Board of an industry trade association as the representative of Wheeling Brake Block. (See Web site of the Friction Materials Standards Institute at http://www.fmsi.org/FMSI/ bod/ bod.asp listing Burgess and listing Wheeling Brake Block as an "active member" of the organization.) Wheeling Brake Block continues to advertise on a number of internet industrial indexes, including Kellysearch (GC Exh. 55),

[8] I note that Rob Burgess' admissions in this regard confirm the remarkably accurate suspicions voiced by longtime employee Robert Palmer about the purpose behind the establishment of Wheeling Brake Band & Friction. Asked why Robert Burgess "used the name Band & Friction," Palmer, explained:

> A. I think he was [a]voiding his creditors.
>
> Q. And what do you base that on?
>
> A. At times he would be changing banks and when we questioned him about
>
> it, which we knew he'd been doing it we'd question him about it, and
>
> he said, "Well, it just make a better thing", but when it come back around
>
> it—something other than what he said took place.
>
> Q. Can you explain that—what do you mean by that? When you asked
>
> him about it he said what?
>
> A. Uh—I guess he was under a couple suits, law suits. And to me—to my opinion only that he was avoiding the law suits.
>
> Q. By using the name Band & Friction?
>
> A. Yeah.

[9] I need not and do not reach any judgment on this practice except to note that it further illustrates the less than arm's-length relationship between these companies.

ThomasNet (GC Exh. 54) and with MacRae's Blue Book, which contains, in addition to the telephone, fax, address of Wheeling Brake Block, a map showing how to get to the facility. (GC Exh. 52.) Wheeling Brake Block also advertises on ThomasNet, an internet site providing similar services. (GC Exh. 54.)

As discussed supra, the "change" to Wheeling Brake Band & Friction changed nothing in terms of the work, operations, or Wheeling Brake Block's presence in the marketplace. The employees also continued to receive the wages and benefits set forth in the labor agreement, negotiated by Burgess on behalf of Wheeling Brake Block. Collective bargaining continued as always. As it had done in a series of collective-bargaining agreements stretching back to at least 1985, Wheeling Brake Block continued to enter into collective-bargaining agreements with the Union covering the Bridgeport employees, the last being an agreement effective October 1, 2001, to at least September 30, 2004, that was unlawfully repudiated in July 2003. Lee Burgess's name and signature is on the contract on behalf of Wheeling Brake Block for the 1985–1988 and 1990–1993 contracts. In subsequent years, beginning with the 1995 contract, and continuing through and including the 2001 contract, Rob Burgess signed for Wheeling Brake Block. He also negotiated the contracts, although Randy Belliel, the union representative who negotiated the 1995 agreement, credibly testified that Rob Burgess indicated that measures he agreed to had to be accepted by his father in order for any agreement to move beyond a tentative agreement. According to Palmer, who served on the Union negotiating committee for the 1995 and 2001 labor agreements, during negotiations for both agreements Rob Burgess would consult with his father after negotiating sessions. Palmer testified that although he only saw Lee Burgess at the plant three-four times over the years, Rob Burgess would tell employees that "on quite a few things that he wanted to change [h]e'd check with Lee and see if he could change them." Palmer specifically recalled this happening in the year 2000, when the Union demanded that a sander being added to the operation be part of the bargaining unit's work. According to Rob Burgess, Lee Burgess advised him to shut down the sander. Generally, Palmer recalled that after a shift "usually" he could walk into Rob Burgess' office and find him in conversation with Lee Burgess.[10]

In his capacity as vice president and general manager of Wheeling Brake Block, Burgess continued to respond to grievances (GC Exh. 21), enter into pension agreements (GC Exh. 20(b) at p. 12 of Agreement and Declaration of Trust; see also GC Exh. 20(c)(2)), and communicate with the Union with fax cover sheets and letterhead (GC Exh. 17, 24) indicating that the correspondence was from Wheeling Brake Block Mfg. Co. His e-mail address was displayed as "wheeling Brake Block Mfg. Co.—General Manager" at the address whgbb@worldnlet.XXXX. The fax marking on documents sent by Burgess reflect that they come from "Wheeling Brake Block" (ee GC Exh. 13 dated September 17, 2003). In 2004, Burgess personally signed acknowledgements as the vice president of Wheeling Brake Block Manufacturing Company verifying statements the Company's counsel made on behalf of the Respondent in this case. In addition, Rob Burgess signed a questionnaire from the NLRB in 2004 in which he indicated that Wheeling Brake Block employed 13 individuals at the Berkley Avenue site. (GC Exh. 48).[11]

In the face of the active and open continued operation of Wheeling Brake Block by Rob Burgess, the record is devoid of any evidence that at any time Lee Burgess, as president of Wheeling Brake Block (or in any other capacity) took any steps at all to prevent Rob Burgess from acting on behalf of Wheeling Brake Block. To the contrary, Wheeling Brake Block continued to operate under Rob Burgess' direction, with no evidence of any objections from Lee Burgess, or anyone else acting on behalf of Wheeling Brake Block.

I accept, as Lee Burgess contends, that his influence over Wheeling Brake Block waned over time as Rob Burgess arrogated to himself more and more of the decisionmaking relating to the operation of the Berkley Avenue facility. Whether Rob Burgess "stole" the facility from him, as he contends, is not a question I need resolve. For present purposes, it is enough to recognize that Lee Burgess' declining role developed over time and that he was barred by his son from the property only as of 2005, well after the commission of the unfair labor practices at issue in this case. The evidence shows that Rob Burgess was in regular consultation with him before that, and Lee Burgess (or one of his companies) has continued to pay bills and taxes. As Lee Burgess stated, "I've even paid his taxes four or five times because the girls in my office didn't know the difference between Wheeling Brake Block and Wheeling Brake Band & Friction, they just saw it was mine so I paid them—property taxes." Burgess also admitted that his various companies, including Wheeling Brake Block make products for each other:

> Well, we make brake blocks for each other, yeah. Occasionally.
>
> Q. Okay?
>
> A. I guess that's what you call an association. He has presses. You have to have molds for these things, hundreds of them at all different sizes.
>
> Like I said, that one brake block we make is 30 inches wide, 35 inches long, 200 inches in diameter, weighs 176 pounds, which is more than you weigh, one brake block. He has molds for different stuff.

[10] Counsel for Lee Burgess objected to this testimony on grounds of hearsay. However, Rob Burgess' statements to Palmer are admissions of a party opponent. Specific statements Rob Burgess attributed to Lee Burgess require another level of hearsay analysis, but Lee Burgess was and is the president of Wheeling Brake Block, and at that time, certainly, an agent of the company, and therefore the statements attributed to him are admissions of a party opponent. In any event, the fact of Lee Burgess' consultation with Rob Burgess on matters of labor relations is the important point, and it is established by Palmer's credited testimony of his conversations with Rob Burgess.

[11] The only employment-policy document in the record under the name of Wheeling Brake Band & Friction is the first page of a "Drug Free Workplace Policy" memo that, by its terms, was to become effective July 1, 2002. That policy, which Brawdy testified was "something new" that Burgess started, involved employees attending monthly meetings on the subject. It was applicable to all employees at the facility.

> Everybody has a different mold, thousands of molds. So if you have a mold in Mobile, you make it in Mobile, if you have it in Ohio, you make it in Ohio. We do exchange back and forth.

I reject and do not credit the assertions of Lee Burgess—mostly offered in the form of endorsements of the leading suggestions of his counsel—that Wheeling Brake Block "shut down so to speak" or "stop[ped] doing business" in 1999. The evidence suggests that when Burgess says "we shut it down" he means only that the decision was made to transfer the employee payroll and, for tax purposes, the assets of the company to Wheeling Brake Band & Friction. At some point the name Wheeling Brake Band & Friction began to appear on some products some of the time, but in no sense did Wheeling Brake Block close or shut down. There was no sale or arm's-length transfer of the assets or liabilities of the Company.

Analysis and Discussion

A. Wheeling Brake Block is Properly a Respondent

Before turning to the General Counsel's amendments, I consider Lee Burgess' claim—the one that prompted the Board's remand—that Wheeling Brake Block is not a proper party in interest in this case. The claim is based on the contention that Wheeling Brake Block "shut down" or went out of business in approximately 1999, leaving Wheeling Brake Band & Friction as the sole surviving employing entity. Lee Burgess contends that Wheeling Brake Band & Friction is a successor to Wheeling Brake Block, and as such the only proper respondent for the unfair labor practices that began in 2003.

This claim is without substance. There was no shutdown of Wheeling Brake Block in 1999. This is manifest from its continued engagement in collective bargaining, its advertising, its continued production under the name Wheeling Brake Block, the maintenance of its management and employee structure that continued without change. Lee Burgess, the president and owner of Wheeling Brake Block continued to advise and consult with Rob Burgess about the operations long after 1999, including during subsequent bargaining with the Union. I don't doubt for a second that the current bad blood between Lee and Rob Burgess is real. But Lee Burgess does not point to a single phone call, letter, or conversation, much less any legal action, demonstrating that at any time there was an effort to stop Rob Burgess from using the name Wheeling Brake Block, or from operating as Wheeling Brake Block. The claim in Attorney Morelly's original submission to the Board that Robert Burgess "usurped" the identify of Wheeling Brake Block, "pos[ed] as an agent of Wheeling Brake Block," used its name without permission, or executed labor agreements with the Union "without the authority" of Wheeling Brake Block is a claim backed by nothing. Assuming a corporate struggle between family members internal to Wheeling Brake Block (the son/vice president of the company taking control from the father/president), it is not relevant to Wheeling Brake Block's obligations under the Act.

The evidence marshaled in support of the claim that Wheeling Brake Block exited the industrial brake lining business in 1999 is the changeover of employee payroll to Wheeling Brake Band & Friction along with tax returns showing diminished earnings and expenditures after 1999. Given the nonarm's-length relationship between Wheeling Brake Band & Friction and Wheeling Brake Block, this transfer of payroll and tax obligations to Wheeling Brake Band & Friction does not support the claim that Wheeling Brake Block went out of business. Notably, the transfer of assets to Wheeling Brake Band & Friction (for the purpose of sheltering them) began long before 1999, as evidenced by the admissions of Rob Burgess in his deposition. None of this evidence was contradicted by Lee Burgess in his testimony. Moreover, although the record does not allow more detailed findings, the bulk of the payroll was transferred to Wheeling Brake Band & Friction before 1999, at a time when even Lee Burgess concedes that Wheeling Brake Block was the employing entity. This is clear, as the 1998 1120 tax forms placed into the record show that only $18,795 was attributed to salaries and wages, none for employee benefit programs, and $220 attributed to pension costs. These figures are a pittance of the amount of wages and benefits that must have been paid out to or contributed on behalf of approximately ten employees that year. Clearly, the payment of employee wages and benefits by some entity other than Wheeling Brake Block precedes May 1, 1998 (the earliest period covered by 1999 1120 forms). Yet it is solely this sharing of the employee wage burden that Lee Burgess relies upon to argue that Wheeling Brake Block ceased being an employer in 1999.[12]

Under these circumstances, the effort to remove Wheeling Brake Block as a party in interest in these proceedings is not well taken. In short, Rob Burgess did not perpetrate a fraud on the Board when, he and Attorney Duff, on behalf of Wheeling Brake Block, admitted that Wheeling Brake Block was the employing entity and that Rob Burgess was its agent. He was and is, and his father's unhappiness with the direction his son has taken Wheeling Brake Block cannot be solved by appeal to the Board to eliminate Wheeling Brake Block as a respondent in this case.

B. Wheeling Brake Band & Friction's Status as a Respondent

The Government contends that Wheeling Brake Block and Wheeling Brake Band & Friction are joint and severally liable for the unfair labor practices. The contention that these entities constitute a single employer for purposes of the Act is compelling.

A single-employer analysis is appropriate where two ongoing businesses are coordinated by a common master. See *APF Carting, Inc.*, 336 NLRB 73 fn. 4 (2001) (citing *NYP Acquisition Corp.*, 332 NLRB 1041 fn. 1 (2000), enfd. 261 F.3d 291 (2d Cir. 2001)). "Stated otherwise, the fundamental inquiry is whether there exists overall control of critical matters at the policy level." *Emsing's Supermarket, Inc.*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989) (footnotes omitted). In *Flat Dog Productions Inc.*, 347 NLRB 1179, 1180–1181 92006), the Board explained:

[12] I note that the Respondent's tax returns are limited to the first page filed for 1998–2002. Attached statements, schedules, etc., are not in the record. Without them, their use, quite apart from the issue I note in the text, is necessarily limited.

> In determining whether two entities constitute a single employer, the Board considers four factors: common control over labor relations, common management, common ownership, and interrelation of operations. *Emsing's Supermarket, Inc.*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989).

The Board has held that the factors of common control over labor relations, common management and interrelation of operations are "more critical" than the factor of common ownership or financial control, and that "centralized control of labor relations is of particular importance because it tends to demonstrate 'operational integration.'" *RBE Electronics of S.D.*, 320 NLRB 80 (1995). However, "[n]o single factor in the single-employer inquiry is deemed controlling, nor do all of the factors need to be present in order to support a finding of single-employer status." *Flat Dog Productions Inc.*, supra; *Bolivar-Tees, Inc.*, 349 NLRB 720, 722 (2007). *RBE Electronics*, supra. "Rather, single-employer status depends on all the circumstances, and is characterized by the absence of the arm's-length relationship found between unintegrated entities." *Dow Chemical Co.*, 326 NLRB 288 (1998). Indeed, the Board has recently explained that "[t]he hallmark of a single employer is the absence of an arm's-length relationship among seemingly independent companies." *Bolivar-Tees, Inc.*, supra.[13]

In this case the single employer status can certainly be found by reference to the Board's four traditional single-employer factors. At all material times, Rob Burgess, sometimes in consultation with his father, controlled labor relations whether for Wheeling Brake Block or Wheeling Brake Band & Friction. There is one management structure for both companies. The operations are entirely interrelated, indeed, commingled is a better description than interrelated.[14] Ownership is nominally separate. Wheeling Brake Block is owned by Lee Burgess and Rob Burgess has refused to grant him an interest in Wheeling Brake Band & Friction, although its profits are dependent on the less than arm's-length relationship of the two companies and the profits of Wheeling Brake Band & Friction have been siphoned off to Lee Burgess and his corporate holdings. In such situations where family members dominate the ownership and management of each company "the Board often treats ownership by other family members as personal ownership." *Centurion Auto Transport, Inc.*, 329 NLRB 394, 397 (1999); *Alexander Bisnitzky*, 323 NLRB 524, 524–525 (1997) ("It is apparent that the companies' relationship is a close family one rather than one between independent companies dealing at 'arm's length.' In these circumstances the Board often treats ownership by other family members as personal ownership") (footnote omitted). Based on the Board's four factor test, these two allegedly distinct companies constitute a single employer under the Act.

Quite apart from the Board's four factor test, the circumstances in this case bear out the appropriateness of the Board's recognition that the absence of an arm's-length relationship between unintegrated entities is the "hallmark" of a single employer relationship. *Bolivar-Tees, Inc.*, supra. Here, there is a sense in which application of the four factors misses the greater point: Wheeling Brake Band & Friction was established by the Burgess' as a means of removing and protecting the profits of Wheeling Brake Block so that they could be enjoyed by the Burgess' without regard for Wheeling Brake Block's government lien holders. Wheeling Brake Block's products were provided to Wheeling Brake Band & Friction for "a dollar a pound or some crazy [price]" and the profits used for all manner of expenses benefiting Lee Burgess, his other companies, and Wheeling Brake Block. Wheeling Brake Band & Friction operated as a safe deposit box for Wheeling Brake Block, separately incorporated as a means of protecting Burgess and Wheeling Brake Block.

According to the admissions of Robert Burgess, this was the practice from the inception of Wheeling Brake Band & Friction in 1994. In this context the decision in 1999 to transfer the employee payroll from Wheeling Brake Block to Wheeling Brake Band & Friction did not affect Wheeling Brake Block's obligations under federal labor law. It was not attendant to any type of arm's-length sale, transfer of assets or change of control. Production did not stop or change in anyway. Wheeling Brake Block continued to advertise, hold itself out to the public, and continued to negotiate, sign, and abide by collective-bargaining agreements with the employees' bargaining representative. The sign out front continued to say Wheeling Brake Block. There has never been the slightest operational separation between Wheeling Brake Block and Wheeling Brake Band & Friction. The latter sold the products provided to it ("for a dollar a pound or some crazy [price]") by the former. They had the same employees, same management, same control. They are truly a single employer. Moreover, it is well settled that "[w]hen two entities are found to be a single employer, one entity's collective-bargaining agreement covers the other entity as well, provided that the two entities' employees constitute a single appropriate bargaining unit." *Stardyne Inc. v. NLRB*, 41 F.3d 141, 144–145 (3d Cir. 1994). Here, there is no distinctions among employees between work they do for Wheeling Brake Band & Friction and the work performed for Wheeling Brake Block. They constitute a single appropriate bargaining unit.[15]

[13] See also *Overton Markets, Inc.*, 142 NLRB 615 (1963) (10 stores in 7 separate companies owned and controlled by members of the same family operated at less than arm's length are single integrated enterprise for purposes of the Act). I note that the Board has also recognized that the absence of an arm's-length relationship between two enterprises is sometimes considered "essentially synonymous" with single-employer status. *Lebanonite Corp.*, 346 NLRB 748 at fn. 5 (2006). However, in other cases, the Board has treated the absence of an arm's-length relationship as bearing on the factor of interrelation of operation. Id.

[14] See *Bolivar-Tees, Inc.*, supra a347 at 723 ("The presence of 'non-arm's length transactions at reduced prices or without payment entirely is . . . probative of interrelation of operations.'" (Quoting *Lebanite Corp.*, 346 NLRB 748 at fn. 5 (2006)).

[15] Because Wheeling Brake Band & Friction is liable as a single employer it is unnecessary to pass on whether it may be liable on an alter ego theory. See *Flat Dog Productions*, supra. I note that the alter ego theory is more readily applicable where a new enterprise is the disguised continuance of part or all of a prior enterprise that has ostensibly ceased operations. See *NLRB v. Hospital San Rafael*, 42 F.3d 45, 50

CONCLUSIONS OF LAW

Based on the foregoing supplemental decision, as well as the December 9, 2005 bench decision and certification issued in this matter, I make the following conclusions of law:

1. Wheeling Brake Block Manufacturing Company and Wheeling Brake Band & Friction Manufacturing Company (an integrated enterprise and single employer hereinafter referred to collectively as the Respondent) are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union, at all material times has been the exclusive collective-bargaining representative, based on Section 9(a) of the Act, of an appropriate unit for such purposes as defined by Section 9(b) of the Act, of the Respondent's employees at its Bridgeport, Ohio facility composed of:

> All production and maintenance employees employed by the Respondent at its Bridgeport, Ohio facility, excluding all office clerical employees and all professional employees, guards, and supervisors as defined by the Act.

4. The Union and the Respondent were parties to a collective-bargaining agreement governing the unit employees' terms and conditions of employment that was effective by its terms from October 1, 2001, through September 30, 2004.

5. By informing an employee that the Respondent was going to get rid of the Union and replace it with a union controlled by the Respondent, by soliciting an employee to assist the Respondent in getting rid of the Union so that others would more readily accept the loss of the Union, by implicitly and explicitly promising the employee that for opposing the Union the employee would be recalled from layoff, and by maintaining and enforcing an overly broad prohibition on union activity on its premises, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

6. By laying off of employees Robert Maxwell, Timothy Colley, Ronald McKenzie, John Cumberlidge, Richard Palmer, and Greg Brawdy, on July 14, 2003, and by failing to recall employees Greg Brawdy and Richard Palmer thereafter, the Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of employees, to discourage membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act.

7. By laying off and recalling employees without regard to the seniority provisions of the parties' collective-bargaining agreement as of July 14, 2003, by withdrawing from the union-industry pension fund as of July 10, 2003, and thereafter failing and refusing to make contractually-mandated contributions to the fund, by failing and refusing to deduct and transmit dues deductions pursuant to the parties' collective-bargaining agreement from July 11, 2003, to September 30, 2004, by repudiating the parties' collective-bargaining agreement as of July 11, 2003, and by failing and refusing the Union's request to recognize and bargain with the Union for the purpose of negotiating a successor collective-bargaining agreement, the Respondent has failed and refused to bargain collectively with the representative of its employees and is in violation of Section 8(a)(1), (5), and (d) of the Act.

8. The unfair labor practices set out in paragraphs 5, 6, and 7, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Based on the foregoing, as well as the December 9, 2005 bench decision and certification, I recommend the following remedy. Having found that Wheeling Brake Block Manufacturing Company and Wheeling Brake Band & Friction Manu-

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(1st Cir. 1994), cert. denied 516 U.S. 927 (1995). Here, I do not believe that Wheeling Brake Block ever even purported to cease doing business and the single-employer theory more accurately describes the situation in this case. However, were there merit to the position that Wheeling Brake Block ostensibly discontinued operations, then I would find that Wheeling Brake Band & Friction operated as a disguised continuance of Wheeling Brake Block. Once the assumption that Wheeling Brake Block ostensibly ceased operations is indulged, Wheeling Brake Band & Friction fits easily within the Board's definition of an alter ego. See, e.g,. *Vallery Electric, Inc.*, 336 NLRB 1272 (2001), enfd. 337 F.3d 446 (5th Cir. 2003). In reasoning adopted by the Board in *Vallery Electric*, the ALJ explained that "the elements necessary to prove alter ego and/or single employer status are much the same. . . . The key elements in establishing an alter ego are 'substantial identity of management, business property, operation, equipment, customers, supervision and ownership.' *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 553–554 (3d Cir. 1983) [cert. denied 464 U.S. 1039 (1984)]." It is also significant in determining alter ego status whether the purpose in creating the new entity was to evade collective-bargaining obligations (see *Fugazy Continental Corp.*, 265 NLRB 1301–1302 (1982), enfd. 725 F.2d. 1416 (D.C. Cir. 1984)), however, such a finding is not required. *Stardyne Inc. v. NLRB*, 41 F.3d at 146–151. As is evident from the discussion in the text, the companies here operate with substantially identical management, business property, operation, equipment, customers, and supervision. Ownership is formally separate, but given the familial relations and lack of arm's-length transaction, this is no impediment to a finding of alter-ego status. As the Board stated in *Kenmore Contracting Co.*, 289 NLRB 336, 337 (1988) ("a finding of common ownership may be made where, although the same individuals are not shown to be owners of each corporation, the corporations are solely owned by members of the same family"), enfd. 888 F.2d 125 (2d Cir. 1989). Family ownership by members of the same family does not compel a finding of substantially identical ownership. "However, it 'militates in favor of an alter ego finding' where, as here, other relevant factors are shown." *Midwest Precision Heating & Cooling*, 341 NLRB 435 (2004) (quoting *Cofab, Inc.* 322 NLRB 162, 163 (1996), enfd. 408 F.3d 450 (8th Cir. 2005)). They have been shown here. As noted, the lack of evidence establishing that Wheeling Brake Band & Friction was established to evade responsibilities under the Act—the evidence suggests other illicit motives—does not undermine an alter ego finding.

Finally, given my findings I also do not reach the General Counsel's contention that the two companies are joint employers, although I note that the designation does not seem applicable. "[A] finding that companies are 'joint employers' assumes in the first instance that companies are 'what they appear to be'—independent legal entities that have merely 'historically chosen to handle jointly . . . important aspects of their employer-employee relationship.'" *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982) (quoting *NLRB v. Checker Cab. Co.*, 367 F.2d 692, 698 (6th Cir. 1966), cert. denied 385 U.S. 1008 (1967)). That assumption is not warranted in this case.

facturing Company (an integrated enterprise and single employer, referred to collectively herein as the Respondent) have engaged in certain unfair labor practices, I find that they are joint and severally liable for remedying the unfair labor practices and must be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully laid off employees Robert Maxwell, Timothy Colley, Ronald McKenzie, and John Cumberlidge, on July 14, 2003, must make each employee laid off whole for any loss of earnings and other benefits they may have suffered in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition to making them whole in accordance with the preceding, as to the two employees the Respondent has, to date, failed to reinstate, Greg Brawdy and Richard Palmer, it must offer each of them reinstatement to the position they occupied prior to the layoff, or to an equivalent position should their prior position not exist, without prejudice to their seniority or any other rights or privileges previously enjoyed.

The Respondent shall rescind the unlawful rule prohibiting union activity on its premises, advise employees it has done so, and that they may engage in union activity on the premises of the Respondent during nonworking time and in nonworking areas, and in other areas and other times on such terms as other nonwork-related activity is permitted, without retribution.

Having found that the Respondent violated Section 8(a)(1) and (5) by repudiating the parties' collective-bargaining agreement as of July 11, 2003, and by failing and refusing to make contractually required payments into the union-industry pension plan, from July 10, 2003, the Respondent shall make the unit employees whole, with interest, for any loss of pay or benefits they may have suffered as a result, in the manner prescribed by *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). The Respondent shall make all contractually required contributions to the union-industry pension plan that have not been made since July 10, 2003, including any additional amounts due the plan, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979).[16] The Respondent shall also reimburse unit employees, with interest, for expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, supra. The Respondent shall reimburse the Union, with interest, for lost dues that should have been paid contractually but were not paid to the Union because of the employer's repudiation of the labor agreement including the dues checkoff provision, for the term of the agreement, which ran until September 30, 2004, in the manner set forth in *Ogle Protection Service*, supra. All interest due and owing in accordance with this paragraph shall be computed as prescribed in *New Horizons for the Retarded,* supra.

The Respondent shall, upon demand of the Union, meet and confer with the Union for the purpose of bargaining a successor collective-bargaining agreement.

The Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to the Employer, it shall sign it or otherwise notify the Region what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, including the December 9, 2005 bench decision and certification, I issue the following recommended[17]

ORDER

The Respondent, Wheeling Brake Block Manufacturing Company and Wheeling Brake Band & Friction Manufacturing Company (an integrated enterprise and single employer), Bridgeport, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from:(a) Informing employees that the Respondent is going to get rid of the Union and replace it with a union controlled by the Respondent, soliciting employees to assist the Respondent in getting rid of the Union so that other employees would more readily accept the loss of the Union, implicitly and explicitly promising employees that by opposing the union employees would be recalled from layoff.

(b) Maintaining and enforcing an overly broad prohibition on union activity on its premises.

(c) Laying off and failing to recall employees to rid itself of the Union and union supporters.

(d) Failing and refusing to abide by and repudiating the collective-bargaining agreement, including the seniority, pension contribution, and dues checkoff provisions of the collective-bargaining agreement.

(e) Upon request, failing and refusing to recognize and bargain a successor collective-bargaining agreement with the Union.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of this Order offer full reinstatement to employees Greg Brawdy and Richard Palmer to their former jobs or, if those positions no longer exist, to sub-

[16] To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

stantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make employees Robert Maxwell, Timothy Colley, Ronald McKenzie, John Cumberlidge, Greg Brawdy, and Richard Palmer, whole with interest, in the manner set forth in the remedy section of this Decision and Order for any loss of earnings or other benefits resulting from the layoff described in this decision and order.

(c) Make all affected employees whole, with interest, in the manner set forth in the remedy section of this decision and order, for any loss of earnings or benefits resulting from the repudiation of the collective-bargaining agreement, including the repudiation of the provisions of the collective-bargaining agreement regarding seniority and pension.

(d) Reimburse the Union, with interest, for dues the Respondent was required but failed to withhold and transmit under the collective-bargaining agreement, in the manner described in the remedy section of this decision and order, resulting from the Respondent's repudiation of the dues checkoff provision of the collective-bargaining agreement.

(e) Make all contractually required contributions to the union-industry pension plan that were not made, including any additional amounts due the plan, in the manner described in the remedy section of this decision and order.

(f) Reimburse unit employees, with interest, for expenses ensuing from its failure to make required contributions to the union-industry pension plan, in the manner described in the remedy section of this decision and order.

(g) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit described in the decision and order concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in signed agreements.

(h) Rescind the rule prohibiting union activity on the premises of the Respondent and advise employees that it has done so, and that they are free to engage in union activity at the Respondent's facility during nonworking time and in nonworking areas, and in any other areas and other times on such terms as other nonwork-related activity is permitted, without retribution.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility in Bridgeport, Ohio, copies of the attached notice marked "Appendix B."[18] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 10, 2003.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."